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U.S. Department of Justice

Immigration and Naturalization Service

Identifying data related to
proceedings involving
immigration and naturalization

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

File: EAC 01 268 51540

Office: Vermont Service Center

Date:

JAN 14 2003

IN RE: Petitioner:
Beneficiary:

Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(3)

IN BEHALF OF PETITIONER:

PUBLIC COPY

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a fast food restaurant and ice cream parlor. It seeks to employ the beneficiary permanently in the United States as a cake decorator. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, counsel submits a brief and additional evidence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

8 C.F.R. 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. Matter of Wing's Tea House, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the petition's priority date is March 19, 2001. The beneficiary's salary as stated on the labor certification is \$14.83 per hour or \$30,846.40 per annum.

Counsel initially submitted a copy of the petitioner's 2000 Form

1120S U.S. Income Tax Return for an S Corporation which reflected gross receipts of \$283,352; gross profit of \$194,102; compensation of officers of \$0; salaries and wages paid of \$84,216; and an ordinary income (loss) from trade or business activities of \$5,130.

On November 5, 2001, the director requested additional evidence to establish that the petitioner had the ability to pay the proffered wage.

In response, counsel submitted a letter from the petitioner's accountant and unaudited financial statements for Zek, Inc. and Syed, Inc. for 2001.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition accordingly.

On appeal, counsel submits a copy of the petitioner's 2001 Form 1120S U.S. Income Tax Return for an S Corporation which reflected gross receipts of \$33,021; gross profit of \$24,121; compensation of officers of \$2,000; salaries and wages paid of \$9,694; and an ordinary income (loss) from trade or business activities of -\$2,069. Counsel further submits copies of the 2001 Form 1120S U.S. Income Tax Return for an S Corporation for [REDACTED]

Counsel argues that:

In 2001 [REDACTED] showed a net income of -\$2,069.00 and a \$0 depreciation deduction, yielding a total of -\$2,069.00 with which to compensate the Beneficiary.

In 2001 [REDACTED] showed a net income of \$4,852.00 and a \$36,762.00 depreciation deduction, yielding a total of \$41,614.00 with which to compensate the Beneficiary.

In 2001 [REDACTED] showed a net income of -\$26,068.00 and a \$58,068.00 depreciation deduction, yielding a total of \$32,000.00 with which to compensate the Beneficiary.

In total, the petitioner's yielded \$73,614.00 with which to compensate the beneficiary at the time of filing.

Counsel's argument is not persuasive. In determining the petitioner's ability to pay the proffered wage, the Service will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other

expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well-established by both Service and judicial precedent. Elatos Restaurant Corp. v. Sava, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, 736 F.2d 1305 (9th Cir. 1984); see also Chi-Feng Chang v. Thornburgh, 719 F.Supp. 532 (N.D. Texas 1989); K.C.P. Food Co., Inc. v. Sava, 623 F.Supp. 1080 (S.D.N.Y. 1985); Ubeda v. Palmer, 539 F.Supp. 647 (N.D. Ill. 1982), aff'd, 703 F.2d 571 (7th Cir. 1983). In K.C.P. Food Co., Inc. v. Sava, the court held the Service had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." Chi-Feng Chang v. Thornburgh, 719 F.Supp. at 537; see also Elatos Restaurant Corp. v. Sava, 632 F.Supp. at 1054.

In addition, counsel argues that all the companies are under common control and ownership. Counsel argues that the Service failed to take into account the net taxable income of the petitioner from all of the companies in determining the petitioner's ability to pay the wage offered.

The petitioning entity in this case is a corporation. Consequently, any assets of the individual stockholders including ownership of shares in other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See Matter of M, 8 I&N Dec. 24 (BIA 1958; AG 1958); Matter of Aphrodite Investments Limited, 17 I&N Dec. 530 (Comm. 1980); and Matter of Tessel, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980).

The petitioner's Form 1120S for calendar year 2001 shows an ordinary income of -\$2,069. The petitioner could not pay a proffered salary of \$30,846.40 out of this figure.

In addition, the petitioner's 2000 federal tax return also shows an inability to pay the wage offered.

Accordingly, after a review of the federal tax returns, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing to present.

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The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.